IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DEVON ENERGY PRODUCTION COMPANY, L.P.	§	
Plaintiff,	§	
vs.	§	**Case No. 1:10-cv-00665-JAP-RLP**
MOSAIC POTASH CARLSBAD, INC., A DELAWARE CORPORATON,	§	
Defendant.	§	

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S 12(b)(1) MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

On August 11, 2010, Defendant Mosaic Potash Carlsbad, Inc. (Mosaic) filed a Rule 12(b)(1) motion to dismiss on the grounds that a federal question and case or controversy were not present to confer this Court with subject matter jurisdiction over Plaintiff Devon Energy Production Company, L.P.'s (Devon) complaint. Specifically, Mosaic alleged that complete preemption was not present in this case, and that the interactions between the parties did not provide the necessary elements to establish a case or controversy. Devon requests that the Court deny Mosaic's motion to dismiss for lack of subject matter jurisdiction because there is both federal question jurisdiction and a justiciable case or controversy under Article III of the United States Constitution.

I.

PROCEDURAL BACKGROUND

1.1 Devon's Complaint (filed on 7/15/2010, Docket # 1), which is incorporated herein by reference for all purposes, asserts that the Secretary of Interior and the Bureau of Land Management (the BLM), acting under an express grant of authority by Congress to manage federal lands, created a preemptive federal land management plan for all operations and related activities involving oil, gas, and potash in the Potash Area[1].[2] Because the federal concurrent development scheme completely preempts conflicting state law, Mosaic's only remedies are those available under the relevant federal laws, rules or regulations which do not provide for Mosaic's monetary claims for damages.

1.2 Mosaic's motion to dismiss (filed on 8/11/2010, Docket # 9), which along with its exhibits is incorporated by reference herein for all purposes, erroneously claims that Devon asserted that federal law completely preempts all oil and gas, and potash operations and activities with regard to the location and drilling of oil and gas wells and mining operations in the whole state of New Mexico. Mosaic also contends that its claims are based solely on questions of state law and that there was no case or controversy present in this case sufficient to confer subject matter jurisdiction on this Court.

1.3 Contrary to Mosaic's description, Devon does not assert complete federal preemption outside the Potash Area; rather, Devon is merely asserting that there is complete preemption as to the federally-owned and managed lands in the Potash Area, which includes the federally-owned land upon which the well in question, the Apache 25 Federal # 16 Well (Apache Well), is located. Again, contrary to Mosaic's assertions, Congress and the Secretary of Interior have provided Mosaic with a private remedy via the APA, various administrative regulations, and the 1986 Order. Thus, because Congress provided Mosaic with federal remedies and because federal law preempts conflicting New Mexico law regarding the Potash Area, this Court has federal question jurisdiction under the doctrine of complete preemption.

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[1] The Potash Area refers to land located in Eddy and Lea Counties, New Mexico, now comprising approximately 497,000 acres, which is under the management and control of the Secretary of Interior and the BLM.

[2] The following legal authorities, cited by in Devon's Complaint, evidences that there is complete preemption of conflicting state law in the Potash area: United States Constitution article VI, clause 2 (Supremacy Clause), article IV, section 3, clause 2 (Property Power), the Administrative Procedure Act (APA), Title 5, United States Code, section 702, et sequitur, The Federal Mineral Leasing Act of 1920 (FMLA), Title 30 United States Code section 181-287, the Federal Land Policy and Management Act (FLPMA), the Secretary of Interior's 1986 Order (1986 Order), 51 Fed. Reg. 39,425 (October 28, 1986), and the Regulations promulgated thereunder.

1.4 Regarding Mosaic's assertion that its claims would not contain federal questions, Devon disagrees because this Court would still have to construe and apply federal law when considering Mosaic's claims. The Court has subject matter jurisdiction over Devon's suit because Mosaic's claims for monetary damages rest on a substantial proposition of federal law: whether the BLM properly approved of the Apache Well. In the alternative, even if the Court finds that Mosaic's claims are found not to require an application of federal law, the Court still must decide whether Devon is subject to conflicting state and federal law, which also vests this Court with federal question jurisdiction under 28 U.S.C. § 1331.

1.5 Regarding Mosaic's final argument that this case lacks a case or controversy sufficient to confer subject matter jurisdiction, the facts of this case illustrate that a justiciable case and controversy exists.

1.6 For these reasons, the Court should deny Mosaic's motion to dismiss.

II.

FACTS

A. Brief History of Federal Management of the Potash Area[3]

2.1 In 1939, the Secretary of the Interior designated land located in Eddy and Lea Counties, New Mexico (now comprising approximately 497,000 acres) as the "Potash Area" for purposes of federal land management. Upon information and belief, federal lands constitute

[3] What follows is a brief review of the history of federal management of lands involved in this suit. For a more in-depth discussion, please see Devon's Complaint for Declaratory Relief.

approximately 80% of the lands within the Potash Area, and the lands involved in this controversy are all federal.

2.2 Pursuant to the authority derived through the FMLA, the Secretary of Interior has authority to issue mineral leases on federal lands. 30 U.S.C. §181-287 (2009). The Secretary has delegated that authority to the BLM. 43 U.S.C. §1731. The BLM issues both oil and gas leases and potash leases for lands within the Secretary's Potash Area. The Federal Land Policy and Management Act (FLPMA) directs that the BLM administer public lands on the basis of "multiple use" unless otherwise specified by law. 43 U.S.C. §1701(a)(7).

2.3 The management of the Potash Area has been subject to several secretarial orders, and the relevant Secretarial Order for the purposes of this action is the 1986 Order. 51 Fed. Reg. 39,425 (October 28, 1986). A copy of this Order is attached as Exhibit # 1.

2.4 The 1986 Order sets forth extensive rules for concurrent exploration and production of both oil and gas and potash deposits within the Potash Area. The lease stipulation portion of the 1986 Order creates a concurrent development scheme for the management of federal mineral development in the Potash Area. Under the concurrent development scheme, each oil and gas lease and each potash lease issued for lands in the Potash Area contain four reciprocal stipulations that preclude each mineral lessee from causing a hazard to or interfering with the operations of any other lessee on the same lands. 51 Fed. Reg. 39,425, Part III., A, C. Under the first lease stipulation, the oil and gas lessee must establish, to the BLM officer's satisfaction that drilling will not interfere with mining and recovery of potash deposits. If the lessee's Application for Permit to Drill (APD) cannot meet this burden, the BLM may nonetheless approve the APD if it is in the best interest of the United States to do so. Under the second lease stipulation, the BLM must make certain that each APD submitted by an oil and gas lessee would not unduly waste potash. Finally, the fourth stipulation[4] requires the BLM to impose requirements necessary to prevent infiltration caused by oil and gas drilling, or, alternatively, if such infiltration cannot be prevented, to deny an APD. Thus, with respect to the safety of drilling, the lease stipulations in the 1986 Order preclude the BLM from approving any proposed well that would "constitute a hazard to . . . mining operations being conducted," (Stipulation 2) and further authorizes the BLM to require drilling practices and procedures as "necessary to prevent the infiltration of oil, gas or water into formations containing potash deposits or into mines or workings . . . [Stipulation 4]." 51 Fed. Reg. 39,425.

2.5 Thus, the concurrent regulatory scheme specifically delineates the required procedure operators must follow in order to drill for oil and gas in the Potash Area. These provisions require the BLM to make various factual determinations as a condition precedent to approving an APD in the Potash Area. Additionally, the 1986 Order expressly reserves the right to the Secretary of Interior and the BLM to make the final approval for any proposed oil or gas well on a federal lease within the state designated Potash Area. 51 Fed. Reg. 39,425.

B. Relevant Facts

2.6 On March 17, 2005, Devon filed an APD to drill the Apache Well at 1980 FSL and 660 FWL of Section 25. On April 22, 2005, the BLM advised Devon that the March 2005 APD would be denied due to "mining impact," but the BLM suggested that an alternate location between the Apache 12 and 13 wells could be approved for a directional well. Devon filed a Sundry Notice on June 8, 2005, amending the March 2005 APD and requesting the BLM's permission to move the drilling location to 2310 FSL and 1980 FWL of Section 25. On September 9, 2005, the State Director of the BLM approved the amended March 2005 APD and

[4] The third stipulation is not relevant to the issues presented in this response.

filed a Rationale of Approval, approving the proposed drilling at the alternate location. The same day, the BLM approved Devon's Sundry Notice reflecting the change.

2.7 Thereafter, due to an error in identifying the BLM-approved site, Devon inadvertently drilled the Apache Well at the wrong location. Devon did not discover this mistake until early February 2006, at which time it immediately notified the BLM. Devon confirmed this notice with a letter to the BLM, dated February 10, 2006. This letter advised the BLM of Devon's mistake and requested approval of the Apache Well as drilled. (Exhibit # "2," Feb. 10, 2006 Letter to the BLM). Devon also sent a Sundry Notice dated February 10, 2006 to the BLM.

2.8 After receiving the Sundry Notice, the BLM performed an environmental assessment (EA) to determine the environmental impact of the Apache Well as drilled, notice of which was posted on a public website for thirty (30) days prior to the BLM's approval of the 2006 Sundry Notice. Along with the EA, the BLM also issued a decision of record regarding the Apache Well. On March 27 2006, the BLM approved the Sundry Notice Devon sent to it on February 10, 2006 (March 2006 Sundry Notice). (Exhibit # "3," Mar. 2006 Sundry Notice). The Apache Well has been producing since original completion.

2.9 On June 6, 2006, Devon received a letter from Mosaic's attorneys, stating that Mosaic was aware of Devon's February 10, 2006 letter to the BLM, and the unauthorized drilling of the Apache Well. In this letter, Mosaic asserted that it had a claim for $27 million in lost potash against Devon. (Exhibit "A" to Mosaic's Mot. to Dismiss). On December 16, 2008, Mosaic again wrote to Devon and increased its monetary demand to an amount in excess $160 million. (Exhibit "I" to Mosaic's Mot. to Dismiss). In this letter, Mosaic also stated that it had already prepared and was ready to file a complaint if the matter could not be resolved. (Exhibit "I" to Mosaic's Mot. to Dismiss).

2.10 From June 2006 until June 2010, Devon and Mosaic corresponded regarding the factual basis for Mosaic's contentions that it had suffered $160 million in damages. Devon requested data supporting Mosaic's claim for monetary damages, and Mosaic sent confidential data to Devon which Mosaic alleged supported its claims.

2.11 However, Mosaic's letter of June 17, 2010 clarified and ensured that that only a declaratory suit could settle the parties' dispute because the letter set two unyielding conditions on a proposed mediation, making further negotiations untenable. Under the first condition, Mosaic demanded that Devon admit liability for damages. Under the second condition, Mosaic demanded that Devon admit that Mosaic had suffered monetary damages. Such pre-conditions were unacceptable. Furthermore, Mosaic's prior correspondence also stated that Mosaic had already prepared a complaint and that Mosaic would not spend time mediation without Devon's agreement to Mosaic's conditions for mediation. Thus, Devon was forced to file this declaratory suit.

2.12 Finally, through Mosaic's demands, Devon notes that Mosaic has failed to file any protest or objection with the BLM as to the location of the Apache Well. Also, Mosaic has failed to file any administrative actions, by way of appeal or otherwise.

III.

ARGUMENT AND AUTHORITIES

A. This Court has federal question because there is complete federal preemption and Mosaic's claim require the Court to construe federal law.

3.1 This Court has federal question jurisdiction over this case because federal law has completely preempted state law and because Mosaic's state claims, if they have not been preempted, rely on the proposition of federal law. Devon's declaratory judgment claim is based on issues of federal law, namely, complete preemption, and Mosaic's state claims also turn on the question of whether the Apache Well was drilled in violation of federal law. Because Devon's complaint involves these two federal questions, this Court has jurisdiction to hear the suit.

1. Federal law has completely preempted state law in the Potash Area.

3.2 The Supreme Court has set precedent in which federal law completely preempts state law. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262-63 (1994) (complete preemption of law in minor disputes between a railroad employee and carrier); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (complete preemption of the field of facts involving disputes over collective bargaining agreements in labor contracts); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-57 (1987) (complete preemption of disputes arising under ERISA plans); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (complete preemption in cases involving usury claims against national banks); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 675-78 (1974) (complete preemption of cases involving Indian Tribal Property Rights). In these cases, the Supreme Court established two complete preemption elements: (1) federal law has completely pre-empted or transformed the substantive area of law so that any complaint alleging facts that come within the scope of federal law must arise under federal law, even if the plaintiff has asserted a state cause of action; and (2) [the so called "re-characterization" element] Congress has provided for a federal remedy:

> . . . a state claim may be removed to federal court in only two circumstances--when Congress expressly so provides . . . or when a federal statute wholly displaces the state-law cause of action through complete preemption. When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court. In the two categories of cases where this Court has found complete preemption--certain causes of action under the LMRA and ERISA--the federal statutes at issue provided the exclusive cause of action for the

claim asserted and also set forth procedures and remedies governing that cause of action. *See, e.g.*, *Anderson*, 539 U.S. at 8.

a. Federal law regarding minerals in the Potash Area preempts conflicting state law.

3.3 The Supremacy Clause in Article VI of the United States Constitution states that the Constitution and the laws of the United States will be the supreme law of the land, notwithstanding anything contained in the Constitution or laws of any state to the contrary. U.S. Const. art. VI, cl.2. The Supreme Court has consistently ruled that when state laws conflict with Congress's management of federal property, those conflicting state laws are necessarily preempted by the federal scheme. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529 (1976).

3.4 The *Kleppe* case involved action by New Mexico authorities who rounded up wild burros on federal land. The New Mexico authorities claimed authority to act under the New Mexico Estray Law, N.M. STAT. ANN. §47-14-1 et seq. (1966). *Id.* at 531-35. The BLM objected and demanded that the burros be returned under the preemptive authority granted by the Wild Free-Roaming Horses and Burro Act, 16 U.S.C. §§ 1331-1340 (1971). *Id.*

3.5 The Supreme Court declared that the Property Clause in the Constitution gives Congress the power to exercise jurisdiction over federal lands. Further, if this power is exercised, the federal legislation, and the policies and objectives therein, preempt conflicting state laws and policies under the Supremacy Clause:

> . . . for the Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "(t)he power over the public land thus entrusted to Congress is without limitations." *Id.* at 539 (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)) (internal citations omitted).

3.6 The Ninth Circuit Court of Appeals and the Tenth Circuit Court of Appeals have also specifically addressed FMLA preemption of state law. Regarding the management and development of federal minerals, both the Ninth and Tenth Circuits have found preemption based on the Property Power and the Supremacy Clause in the United States Constitution. *See e.g.*, *Ventura County v. Gulf Oil Corporation*, 601 F.2d 1080 (9th Cir. 1979); *Kirkpatrick Oil & Gas Co. v. U.S.*, 675 F.2d 1122, 1124 (10th Cir. 1982).

3.7 The *Ventura County* case involved a federal oil and gas lease issued in 1974 on 120 acres located in the Los Padres National Forest in Ventura County. *Ventura County*, 601 F.2d at 1082. In 1976, the United States Department of Interior, Geological Survey approved an APD, filed by Gulf Oil Corporation to drill. *Id.* The U.S. Forest Service also granted Gulf the right to drill. *Id.* However, Ventura County had zoned the property so that oil and gas exploration was prohibited unless a lessee obtained an Open Space Use Permit. *Id.* Gulf refused to obtain a permit. *Id.* Ventura County filed suit in California Superior Court, and Gulf removed the action to Federal Court. *Id.* In federal court, Ventura County asked for declaratory judgment and a preliminary injunction to stop the drilling. *Id.* The District Court dismissed the suit and the Ninth Circuit affirmed. *Id.* at 1082, 1086.

3.8 In holding that the local Ventura County zoning regulations were preempted by federal law and the actions of the Secretary, the Ninth Circuit relied upon Supreme Court precedent of the *Kleppe* decision. The Ninth Circuit held that Ventura County's attempt to restrict the scope of congressional power under the FMLA was "legally frivolous." *Id.* at 1083. The court held that when state law conflicts with the regulatory scheme developed by the Secretary, the state law must be preempted by federal law.[5] In clarifying the broad preemptive scope of the FMLA,

[5] "The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.
The present conflict is no less direct than that in *Kleppe v. New Mexico*, supra. Like *Kleppe*, our case involves a power struggle between local and federal governments concerning appropriate use of the public lands. That the New Mexico authorities wished to engage in activity that Congress prohibited, while the Ventura authorities wish to regulate conduct which Congress has authorized is a distinction without a legal difference." *Id.* at 1084.

the Ninth Circuit held that when Congress acts under the Property Clause[6], Congress has the power to give the Secretary of the Interior the authority to manage federal property. This includes the power to override any conflicting state laws or regulations regarding the "congressionally approved use of federal lands:"

> Although state law may apply where it presents "no significant threat to any identifiable federal policy or interest", the states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands . . . . *Id.* (quoting *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 371 (W.D. Okl. 1967).

3.9 The Tenth Circuit analyzed similar issues in the *Kirkpatrick* decision. The controlling issue in *Kirkpatrick* was whether state compelled communitization bound the federal government. *See Kirkpatrick Oil & Gas Co. v. U.S.*, 675 F.2d 1122, 1123 (10th Cir. 1982). In answering that state communitization orders were not binding on the Secretary unless the Secretary approved such orders, the Tenth Circuit adopted the holding of the *Ventura* decision. *Id.* at 1124.

3.10 The Tenth Circuit held that the Secretary has broad authority to manage federal lands, especially when state law conflicts or poses a threat to "any identifiable federal policy or interest." *See id.* at 1126. One example the Tenth Circuit cites to support this holding is that "federal lessees unable to secure the Secretary's approval . . . should not be able to circumvent that requirement by obtaining a compulsory state pooling order." *Id.*[7]

3.11 In line with this federal precedent regarding preemption, administrative decisions regarding the approval and denial of wells in the Potash Area, made by administrative law judges (ALJ), and the Interior Board of Land Appeals (IBLA), have expressly recognized that the concurrent development scheme created by the Secretary in the 1986 Order preempts conflicting state law. *See In the Matter of Yates Petroleum Corp.*, *et. al.*, IBLA 92-612, 34-42, *affirmed by*, 170 IBLA 25, *case dismissed on jurisdictional grounds by*, Civ No. 06-1190 (N.M. Dist. Ct. 2008). In *Yates Petroleum*, the ALJ ruled that the 1986 Order's definition of potash enclaves prevailed over the New Mexico Oil Conservation Division's (NMOCD) definition of Life of Mine Reserves (LMR). In the NMOCD definition, protected areas were established by the "reasonable belief" of a potash lessee. The ALJ rejected the NMOCD definition and found that any decision based on the presence of either an LMR or the state created "buffer zone" conflicted with the scheme developed by the 1986 Order and was preempted by the 1986 Order. *See id.* at 41 (stating "To the extent the recommendations were based upon the presence of an LMR or its associated buffer zone, they were not in accord with the 1986 Order."); *see also id.* at 42 ("LMR's and the attendant buffer zones, which are included in R-111-P, and were included in the proposed 1991 Order, do not equate to potash enclaves as used in the 1986 Order. While the information provided in connection with LMR's is undoubtedly useful to the BLM in making its decisions, the BLM must follow the criteria set forth in the 1986 Order."). In affirming the ALJ's order, the IBLA held that the 1986 Order governed all oil and gas and potash development in the Secretary's Potash Area. 170 IBLA 3.

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[6] U.S. Const. art. IV, §3, cl 2

[7] The Tenth Circuit then goes on to state that if a federal court allowed state orders to apply to federal lands without the Secretary's approval or contrary to federal law, the Secretary's ability to control federal land would be compromised. *Id.* (stating "if state orders were to apply to federal lands without the Secretary's approval, it would interfere with the Secretary's control over its own lessees lease provisions . . .").

3.12 Based on these decisions, it is well-settled that the concurrent development scheme created by the 1986 Order does not allow a would-be plaintiff to artfully plead state law claims in an attempt to avoid federal jurisdiction. First, the common law scheme, upon which Mosaic's claims are based, provides that only one lessee has the exclusive right to develop and produce minerals found in the ground: "A claim of trespass contemplates actual physical entry or invasion . . . . '[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it.'" *See Schwartzman, Inc. v. Atchison, Topeka, & Santa Fe Railway Co.*, 857 F. Supp. 838, 844 (Dist. N.M. 1994) (citing several New Mexico Court of Appeal's decisions and quoting Restatement (Second) of Torts § 821D (1977)). Contrary to Mosaic's claims, the concurrent development scheme for potash and oil and gas, as authorized by the FMLA and the 1986 Order, is explicitly preemptive because it expressly allows for the drilling and mining on land that is shared by two mineral lessees and rejects the idea of exclusive ownership of subsurface minerals. See 51 Fed. Reg. 39,425. As the 1986 Order indicates, the Secretary set up a scheme of concurrent operations for the development of oil and gas and potash deposits. 51 Fed. Reg. 39,425. Under this scheme, an oil and gas lessee can drill through potash ore on land covered by a potash lease issued by the BLM (thus constituting a common law subsurface trespass under state law) without violating the requirements of the stipulation if the BLM makes the findings that no undue waste of potash occurred, no potash ore can be economically mined under current technology, or no hazard or undue interference with mining operations would result from such proposed oil and gas drilling. *See id.*

3.13 In this case, the BLM has already conclusively approved of the Apache Well as drilled. As stated in the fact section above, the March 2006 Sundry Notice approved of the Apache Well as drilled, which is conclusive proof that Apache Well did not violate federal law. Thus, under the concurrent development scheme created by the 1986 Order the BLM found that Devon had not drilled the Apache Well in violation of federal law and that Devon was authorized to continue operating the Apache Well on land covered by Mosaic's lease.

3.14 The 1986 Order also expressly states that it preempts state law. In paragraph III E. 3 of the 1986 Order, the Secretary states that, regardless of New Mexico state law, the Department of the Interior has the ultimate authority regarding whether to approve drilling within the Potash

Area: ". . . the Department shall exercise its prerogative to make the final decision of whether to approve the drilling or any proposed well on a Federal oil and gas lease within the Potash Area." 51 Fed. Reg. 39,426. This statement is entirely consistent with the federal government's authority to preempt state law that conflicts with its management of federal property. *See, e.g.*, *Kleppe* 426 U.S. 529; *Yates Petroleum Corp.*, IBLA 92-612, 41-42.

3.15 When the BLM approved of the Apache Well, its decision was final and cannot be contradicted by Mosaic's claims. To rule otherwise would subject Devon to clearly inconsistent laws and would frustrate and interfere with the government's concurrent development scheme in the Potash Area because no oil and gas lessee would ever drill on lands covered both by a potash lease and an oil and gas lease, if it knew that it would be subject to a state court subsurface trespass action by a potash lessee.

3.16 Finally, the fact-finding schemes implicated by Mosaic's claims are in direct opposition to the fact-finding scheme that governs the Potash Area. Under the concurrent development scheme of the 1986 Order, the BLM makes the final decision regarding whether the potash lessee has suffered damage to mineable potash ore. 51 Fed. Reg. 39,425 ("No wells shall be drilled for oil or gas at a location which, *in the opinion of the authorized officer*, would result in undue waste potash deposits . . ."). Likewise, the BLM is the only entity that could approve the drilling of the Apache Well. 51 Fed. Reg. 39,426, § 3.E.3. There were several resources that aided the BLM officials in approving the Apache Well that are not available to the courts. These resources include, but are not limited to, sophisticated scientific studies, detailed maps of mineable potash ore, and extensive drilling regulations designed to protect the integrity of potash deposits.

3.17 Under the state law scheme, a judge or a jury would be determining whether Devon's conduct was permissible and whether Mosaic had suffered trespass damages. The court would be improperly substituting its judgment for that of the BLM, which has already approved of the Apache Well as drilled.

3.18 In conclusion, the FMLA, enacted by Congress pursuant to the Property Power, granted the Secretary of the Interior the authority to develop a comprehensive federal concurrent mineral management and development scheme in the Potash Area. Acting under this authority the Secretary issued the 1986 Order and its associated administrative regulations. The 1986 Order preempts Mosaic's claims, which are based on the concept an exclusive right of mineral ownership. Because Mosaic's claims conflict with the concurrent development scheme developed by the Secretary, this Court has federal question jurisdiction over this case.

B. Congress has provided Mosaic with private federal remedies under the APA and the 1986 Order.

3.19 Mosaic is correct in its assertion that complete preemption, or claim re-characterization, as previously mentioned, is the only form of preemption that provides the grounds for federal question jurisdiction. Complete preemption requires that there be a private federal remedy available to Mosaic. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

i. Under the APA and the Code of Federal Regulations, Mosaic has the federal remedy to appeal the BLM's approval of the Apache Well.

3.20 Mosaic has a private federal remedy under the APA against the BLM, appealing or protesting the BLM's approval of the Apache Well. *See*, 5 U.S.C. § 702, et seq. (2009). In order to state a cause of action under the APA, a plaintiff must allege (1) the existence of a legal wrong or grievance; and (2) agency action that caused the legal wrong or grievance: "it is fundamental that a party suing under the APA must have suffered a legal wrong because of agency action or inaction." *Tewa Tesuque v. Morton*, 498 F.2d 240, 243 (10th Cir. 1974). The Code of Federal Regulations provides Mosaic with a right to appeal the Sundry Notice. 43 C.F.R. § 4.410(a) allows an aggrieved party to file an appeal from a "decision" of a the BLM officer: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board." 43 C.F.R. § 4.410(a).

3.21 In this case, Mosaic has the federal remedy to bring an appeal before an ALJ, alleging that the BLM's granting the March 2006 Sundry Notice caused them to suffer the legal wrong of lost potash ore that was unduly wasted. The March 2006 Sundry Notice was a "decision" by the BLM, invoking the exercise of discretion by the BLM to approve the drilling of the Apache Well. The BLM exercised discretion in approving the Apache Well, and the execution of the sundry notice constitutes a "decision" under the regulation.

3.22 Because the APA does not allow for the recovery of money damages, Mosaic's remedy will be limited to a request that the IBLA overrule the BLM's decision to grant the Sundry Notice, which, if successful, would require Devon to plug and abandon the Apache Well in accordance with federal regulations. If Devon was required by the BLM to plug and abandon the Apache Well, Mosaic would be able to recover any potash that it claims was lost due to the alleged initial improper approval of the Apache Well because any safety risk to mining potash would be removed and Mosaic would be able to recover all mineable potash ore in the lands covered by its lease.

3.23 Because Mosaic was an "adversely affected party," Mosaic can appeal the BLM's decision approving of the Apache Well. In determining whether an entity is an adversely affected party, a court must analyze two sub-issues: (1) whether the entity is a "party" and (2) whether the entity is "adversely affected" by the BLM's decision. 43 C.F.R. § 4.410 states the definition of a party:

> A party to a case, as set forth in paragraph (a) of this section, is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, e.g., by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action. (c) Where the BLM provided an opportunity for participation in its decision making process, a party to the case, as set forth in paragraph (a) of this section, may raise on appeal only those issues: (1) Raised by the party in its prior participation; or (2) That arose after the close of the opportunity for such participation. 43 C.F.R. § 4.410.

3.24 Under the regulations, Mosaic was a "party" to the BLM decision because Mosaic participated in the "decision making" process with respect to the location of the Apache Well, and could have raised issues related to the location of the Apache Well. Paragraph (c)(2) of the quoted regulation specifically provides a right to appeal issues that "arose after the close of the opportunity for such participation." Thus, even though the BLM's decision came after the participatory decision making process was completed, Mosaic still had the right to appeal the BLM's approval of the Apache Well.

3.25 The BLM's approval of the Apache Well also "adversely affected" Mosaic, bringing Mosaic's claim within the type of claims contemplated by the regulations applicable to appeals from the BLM's decisions. The regulations define an "adversely affected party" as follows:

> A party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest. 43 C.F.R. §4.410(d).

3.26 According to Mosaic's own correspondence in this case, which is attached to their motion to dismiss, the BLM's decision to grant the Sundry Notice "adversely" affected Mosaic because this decision allowed Devon to continue its alleged undue waste of potash reserves under

Mosaic's lease, which allegedly caused Mosaic monetary damages of more than $160 million. Further, extrapolating the claim of waste to its logical conclusion, the continued operation of the Apache Well has had the alleged effect of unduly interfering with Mosaic's mining operations. Thus, under the APA and the aforementioned regulations, Mosaic has the right to appeal the BLM's decision as an adversely affected party, which, if such an appeal is successful, will result in the BLM requiring Devon to plug and abandon the Apache Well.

ii. Mosaic could have filed a map or maps with the BLM detailing the location of Potash that it claims Devon wasted.

3.27 The APA remedy is not the only remedy available to Mosaic under the 1986 Order. Section 3.D.1.c of the 1986 Order states that a potash lessee is required to file maps that detail areas not being mined but in which mineable ore is known to exist.[8] Thus, if Mosaic was concerned about the loss of mineable potash in the area where Devon drilled the Apache Well, it could have filed a map or maps detailing the location of such potash to protect the potash from being damaged or destroyed. To date, Mosaic has not produced any evidence showing that it filed such maps with the BLM.

iii. Mosaic could have voiced its objections to the drilling of the Apache Well directly to the BLM officials.

3.28 Informally objecting to proposed oil and gas well sites is a more practical remedy that Mosaic could have asserted. It is not uncommon for potash lessees, like Mosaic, to voice concerns directly to the BLM officials in the district offices. These discussions often lead to

8 "Each potash lessee shall file annually by January 1, with the District Manager, Bureau of Land Management, a map(s) on which has been delineated the following information with respect to the Federal Potash leases which are then held: . . .

c. Those areas that are not presently being mined which are considered to contain a mineable reserve in one or more ore zone, i.e., those areas (enclaves) where potash or is known (sic) to exist in sufficient thickness and quality to be mineable under existing technology and economics . . . ." 51 Fed. Reg. 39,425.

action by the BLM, such as denial of APDs. Again, there is no evidence that Mosaic ever voiced any objections to the location of the Apache Well as drilled.

3.29 In conclusion, this Court has jurisdiction over this case because Mosaic has a federal remedy under the APA. In addition to private remedies under the APA, Mosaic has two (2) remedies under the 1986 Order: (1) prior to Devon drilling the well, Mosaic could have filed maps with the BLM detailing the location of the mineable potash ore in and around the Apache Well; and (2) it could have informed the BLM about Devon's alleged violations of the 1986 Order. Therefore, the dual requirements of complete preemption, (1) federal preemption and (2) federal remedy, are present in this case, which grants this Court with federal question jurisdiction over Devon's declaratory complaint.

2. Because Mosaic's claims rest on the proposition of federal law, this Court has federal question jurisdiction over this case.

3.30 In Mosaic's zeal to have the declaratory complaint against it thrown out, it overlooks the nature of its claims, and the well-settled jurisprudence regarding subject matter jurisdiction over declaratory judgment complaints. The Supreme Court, the Tenth Circuit, and district court opinions have consistently held that when a plaintiff's declaratory complaint is defensive in nature, courts must, in order to determine whether there is federal question jurisdiction, look at the nature of the defendant's anticipated state court action to determine if it is one that could be brought in federal court.

3.31 A helpful summary of this jurisprudence can be found in the District Court of Kansas' *Trailways, Inc. v. The State Corp. Commission of the State of Kan.* decision. In this decision, Trailways sought a declaration that the Kansas Corporation Commission (KCC) was without authority to deny schedule changes of Trailways' bus routes in certain cities in Kansas because federal law, the Bus Regulatory Reform Act of 1982, preempted state regulation of the schedule changes on interstate routes. *Trailways, Inc. v. State Corp. Commission*, 564 F. Supp. 777, 778 (D. Kan. 1983). KCC moved for dismissal on grounds that the court lacked subject matter jurisdiction because Trailways had only asserted a defense to a pending action in state court. *Id.*

3.32 The district court rejected KCC's motion to dismiss and held that because of the preemption issues and the fact that Trailways would be subject to conflicting state and federal law, that there was federal question jurisdiction. *See id.* at 783. First, the decision of the district court cites the Supreme Court's decision in the well-known *Wycoff* case, which provides that the character of the declaratory defendant's claim in declaratory judgment cases determines whether there is federal-question jurisdiction in District Court.[9] In relevant part, the Tenth Circuit Court's decision in *Madsen* v. *Prudential Federal Savings & Loan Assoc.* held that a case arises under the laws of the United States when the declaratory defendant's claims require the construction of a federal statute or regulation.[10]

3.33 Even if the Court finds that complete preemption is not present in this case, the Court still has federal question jurisdiction because Mosaic's claims require this Court to construe federal law. In this case, the first task of this Court is to look at Mosaic's claims, and the nature of

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9 "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action." *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 242 (1952).

10 "'A case 'arises' under the laws of the United States if it clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws which is determinative of the resulting judgment. Shulthis v. McDougal, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912). Thus, if the action is not expressly authorized by federal law, **does not require the construction of a federal statute and/or regulation** and is not required by some distinctive policy of a federal statute to be determined by application of federal legal principles, it does not arise under the laws of the United States for federal question jurisdiction. *Lindy v. Lynn*, 501 F.2d 1367 (3rd Cir. 1974).'

No argument has been made on appeal that the Madsens' claim is expressly authorized by federal law. Consequently, federal removal jurisdiction is established in this case **only if the Madsens' claim requires the construction of a federal regulation or the application of federal law.**" *Madsen v. Prudential Federal Savings & Loan Association*, 635 F.2d 797, 801 (10th Cir. 1981) (quoting *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1281 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979)) (emphasis added).

Mosaic's claims requires the court determine an issue of federal law. Under the con-current development scheme described above, the BLM, via the authority granted by Congress under the FMLA and the Secretary of the Interior under the 1986 Order, made the ultimate decision to approve of the Apache Well. Therefore, before reaching the merits of Mosaic's claimed monetary damages, this Court would have to determine whether the BLM's decision to approve of the Apache well location as drilled was improper. Under the concurrent development scheme, Mosaic's rights are only violated if it is determined that the BLM's decision was improper. Thus, the very nature of Mosaic's claims requires this Court to construe whether the BLM improperly approved of the Apache Well as drilled, which grants this Court federal question jurisdiction.

3.34 In response to this argument, Mosaic can be expected to claim as it did in its response, that its claims do not involve the construction of federal law. However, if Mosaic's claim is true, it would subject Devon to conflicting regulations, which provides this Court with another basis for federal question jurisdiction. After addressing decisions from the Federal Circuit and the Supreme Court, the court in *Trailways* holds that a claim of federal preemption of state law is sufficient to satisfy jurisdictional requirements.[11] In support of this holding, the Court goes on to distinguish the four cases in which the Tenth Circuit cited *Wycoff* in support of dismissal of actions for lack of jurisdiction on the basis that none of those decisions involved preemption issues. *Trailways*, 564 F. Supp. at 783-84.

3.35 If the Court finds that Mosaic's claims do not require a construction of federal, this Court still has federal question jurisdiction because Devon would be subject to conflicting state and federal laws. In this case, Mosaic's claims are in direct conflict with the system of concurrent

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11 "This Court is convinced that *Wycof* should not be read as barring this claim, and agrees with Justice White that a claim that federal law preemption of state regulation is sufficient to satisfy jurisdictional requirements." *Trailways*, 564 F. Supp. at 783.

development of minerals by multiple lessees on the same land as established by the 1986 Order. Specifically, Mosaic's claims are based on the premise of exclusive mineral ownership, exclusive rights to develop the minerals, and the right to protect invasions of one's property interest by bringing a complaint based on subsurface trespass. *See Schwartzman, Inc. v. Atchison, Topeka, & Santa Fe Railway Co.*, 857 F. Supp. 838, 844 (Dist. N.M. 1994) (citing several New Mexico Court of Appeal's decisions and quoting Restatement (Second) of Torts § 821D (1977)). The federal regulatory scheme provides for concurrent mineral development of the same land by both Devon and Mosaic, provided the BLM finds that Devon's activities would not cause the undue waste of potash. 51 Fed. Reg. 39,425. If Devon was subject to Mosaic's state claims based on the theory of exclusive ownership, the federal regulatory scheme of concurrent development could not be carried out because anytime an oil and gas lessee drilled a BLM approved oil or gas well on land covered by a potash lease, the oil and gas lessee would still be subject to claims of trespass. In short, the concept of trespass is totally antithetical to the federal concurrent development scheme. The issue of preemption presents a federal question to this Court because to hold otherwise would subject Devon to conflicting state and federal laws.

3.36 In summary, subject to the arguments above, if the Court finds that complete preemption is not present in this case, the Court still has subject matter jurisdiction over Devon's suit because Mosaic's threatened claims for monetary damages rest on a substantial proposition of federal law: whether the BLM properly approved of the Apache Well. Or in the alternative, if the Court finds that Mosaic's claims do not require an application of federal law, the Court still must decide whether Devon is subject to conflicting state and federal law, which also grants the Court with federal question jurisdiction.

B. Under the facts of this, there is a justiciable case or controversy under Article III of the United States Constitution.

3.37 Mosaic's final basis for seeking dismissal of this suit is that the there is not a sufficient case or controversy to confer this court with jurisdiction. However, Mosaic's motion overlooks the Supreme Court's decision in *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118 (2007), and the Tenth Circuit's decision in *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236 (2008). The basis of Mosaic's contention that there is not a case or controversy sufficient to confer subject matter jurisdiction to this Court is that Mosaic has only threatened suit and that threats of suits alone are not sufficient to meet the case or controversy requirement of Article III. Curiously, Mosaic cites no Tenth Circuit Court of Appeals decision that supports its position, and the facts of the case illustrate that Mosaic has done much more than threatened suit against Devon.

3.38 In January of 2007, the Supreme Court issued the *MedImmune* decision, which expressly rejected the "reasonable apprehension of imminent suit" test on the basis that it imposed an additional hurdle inconsistent with the Court's Article III jurisprudence and this test is relied on by at least one of the cases cite by Devon.[12] In rejecting the reasonable apprehension of imminent suit test, the Supreme Court clarified its earlier holding in *Altvater v. Freeman*, 319 U.S. 359 (1943), and held that when a plaintiff's self-avoidance of imminent suit is coerced by threatened enforcement action of a private party, it was proper for the district court to accept jurisdiction over the declaratory complaint. *See MedImmune*, 549 U.S. at 130.

3.39 In the decision, the Court cites several factual scenarios that illustrate when there is a sufficient case or controversy to confer jurisdiction on a district court. For example, in the *Aetna Life Ins.* decision, the Court recounted how it held that there was a case or controversy even

12 *See MedImmune*, 549 U.S. at 132 n.11 ("*Altavater* . . . [contradicts] the Federal Circuit's 'reasonable apprehension of suit' test (or, in its evolved form, the 'reasonable apprehension of *imminent* suit' test") (emphasis in original); *see Surefoot*, 531 F.3d at 1238 ("After the district court issued its judgment, however, the Supreme Court, in *MedImmune* . . . , expressly rejected the 'reasonable apprehension of imminent suit' test on the ground that it imposed an additional hurdle inconsistent with the Court's Article III jurisprudence.").

though the reason the declaratory insurer plaintiff sought relief was that the insured defendant had given no indication that he would file suit. *See id.* at 132 n.11. In distinguishing one of its decisions before the enactment of the Declaratory Judgment Act, the Court stated that "[t]he rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III." *Id.* at 134. In relevant part, the Court presents its most concise explanation of its ruling in a footnote: "Article III does not favor litigants challenging threatened *government* enforcement action over litigants challenging threatened *private* enforcement action. Indeed, the latter is perhaps the easier category of cases, for it presents none of the difficult issues of federalism and comity . . . *Id.* at 134 n.12.

3.40 In its first attempt at interpreting the *MedImmune* decision, the Tenth Circuit felt compelled to explain the nuances of the decision, which are summarized here. In formulating a new test for determining the existence of a case or controversy, the Tenth Circuit stressed that the *MedImmune* decision held that a declaratory judgment "controversy" requires no greater showing than what is required by Article III of the United States Constitution.[13] When a court determines the existence of a case or controversy under Article III, jurisdiction has never been decided on the basis of judge wagering on the chance that a party will sue another party, but has always focused on the facts to determine if a present controversy exists between the parties or whether the parties are merely requesting an advisory opinion about a hypothetical dispute. *Id.*

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13 More generally, the Court stressed that the Act's "case of actual controversy" language references Article III's case-or-controversy requirement, *id.* at 771; that a declaratory judgment "controversy" therefore requires no greater showing than is required for Article III; and that the existence of a case or controversy in the Supreme Court's precedents had never depended on one party taking law-breaking or contract-breaching steps before a declaratory suit could be filed. By way of example, the Court cited numerous cases in which declaratory plaintiffs were not required to "expose [themselves] to liability before bringing [declaratory actions]," either to challenge the basis of laws the government enforced against them or to challenge the legal basis of threatened action by private parties. *Surefoot*, 531 F.3d at 1241.

at 1242. Finally, the Tenth Circuit held that "Article III is the touchstone of declaratory judgment jurisdictional analysis and that, for a case or controversy to exist under Article III, a party need not 'bet the farm' by taking actions that could subject them to substantial liability before obtaining a declaration of their rights. That principle applies equally to privity and non-privity settings." *Id.* at 1243.

3.41 Having explained how the *MedImmune* decision displaced the reasonable apprehension of imminent suit test, the Tenth Circuit formulated a new jurisdictional test firmly rooted in Supreme Court precedent and in Article III jurisprudence. The Tenth Circuit stated that a declaratory suit "must be 'definite and concrete, touching the legal relations of parties having adverse legal interests,' must be ' 'real and substantial' ' and 'admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' '" *Id.* at 1244 (quoting *MedImmune,* 127 S.Ct. at 771 (quoting *Aetna,* 300 U.S. at 240-41, 57 S.Ct. 461)). In other words, "'the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* (quoting *MedImmune,* 127 S.Ct. at 771 (quoting *Maryland Cas.,* 312 U.S. at 273, 61 S.Ct. 510)).

3.42 While the Tenth Circuit admits that this is not the easiest test apply, the *Surefoot* decision does guide the Court's decision in this case. Specifically, the court relies on the existence of jurisdiction in *Surefoot* on the basis of several key facts: (1) both the plaintiff and the defendant had employed the same or very similar trademarks; (2) the declaratory defendant had expressed its belief that the Plaintiff's mark infringed on its trademark rights; (3) the declaratory defendant had threatened suit for federal trademark infringement if the plaintiff did not change its name; (4)

the declaratory defendant never withdrew its allegations of ongoing infringement or its threats to sue; and (5) the declaratory defendant engaged in five separate cancelation and opposition proceedings in the TTAB. *Id.* at 1244-46.

3.45 The Tenth Circuit also cites key factors in other decisions that illustrate when there is a sufficient case or controversy present for a district court to assert subject matter jurisdiction. Citing the aforementioned Supreme Court decision in *Aetna*, the Tenth Circuit stresses that the Supreme Court found that the district court in that case had jurisdiction under the following facts: (1) the insured had repeatedly claimed coverage, (2) but noted that the insured had never brought suit; (3) the insurer, who believed there was no basis for the claims, still felt compelled to maintain a sum of money in reserve to guard against the contingent liability posed by the insured's claims; (4) insurer brought suit to remove cloud that insured's claim placed over the insurer's business affairs; and (5) insurer did not want to wait until insured filed suit. *Id.* at 1245. Under these facts, the Court held that there was a sufficient case or controversy because the parties had taken adverse positions with respect to their existing obligations, and the dispute concerned a present right based upon historical or established facts.

3.46 The facts of this case illustrate, that there is a case and controversy sufficient to confer subject matter jurisdiction to this Court. Devon's declaratory suit is definite and concrete, as both Devon and Mosaic's have adverse legal interests of sufficient immediacy and reality. Devon claims that federal law preempts any state law based claim for monetary relief, relegating Mosaic to the Congressionally prescribed administrative remedies under the APA. In contradiction of Devon's claims, Mosaic claims that complete preemption is not present in this case, and that state law only governs Mosaic's claims for monetary relief. In this response, Devon established that the more traditional basis for federal question jurisdiction exists in this case because Mosaic's claims are based on federal law, e.g. whether the BLM improperly approved of the Apache Well location as drilled.

3.47 Devon filed this action for declaratory relief because it was forced to by Mosaic's June 17, 2010 letter. As preconditions to a mediation Mosaic demanded that (1) Devon admit liability for damages and (2) Devon admit that Mosaic had suffered monetary damages. Such preconditions were unacceptable to Devon given that federal law completely preempts state law in this case and that Mosaic, based on the findings of the BLM, has suffered no damages. Under the Supreme Court and Tenth Circuit precedent, Devon did not have to bet the farm on the proposition that Mosaic would not file suit for $160 million dollars if Devon rejected Mosaic's conditions for mediation or wait indefinitely for Mosaic to file suit while the cloud of $160 million dollars continued to threaten Devon's business operations.

3.48 Likewise, the facts of the case illustrate that dispute is real and substantial. First, Devon has already drilled and completed the Apache Well, and the BLM has approved of the location of the well as drilled. Likewise, Mosaic asserts that Devon's alleged improper drilling and completion of the Apache Well, and presumably the BLM's improper approval of the Apache Well, has caused it damages totaling $160 million dollars.

3.49 Finally, Devon has requested a declaration that will conclude or end the controversy between Devon and Mosaic. Devon has requested that this Court declare that Mosaic does not have a right of monetary recovery against Devon, but is instead limited to the administrative remedies against the BLM under the APA because federal law has preempted state law. Mosaic's claims for monetary damages have hung over this suit since the spring of 2006, more than four years. In this time period, Mosaic has threatened suit for ever escalating amounts of money, first for $27 million and then for $160 million, placing Devon under constant threat of suit.[14] Even for a corporation as large as Devon, this threat of monetary damages poses serious injury to its continued business.

IV. PRAYER

4.1 Because the Court has federal-question jurisdiction and because there is a justiciable case or controversy before the Court, Devon requests that the Court deny Mosaic's motion to dismiss and retain the case on the court's docket.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
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14 "Demand is hereby made" and "we will proceed with whatever action is necessary . . ." Exhibit "A" to Mosaic's Mot. to Dismiss. "If we do not hear from you by . . . we will proceed on the basis that you are not interested in discussing this matter . . ." Exhibit "D" to Mosaic's Mot. to Dismiss. "If we cannot resolve it by then, it is our present intention to file the complaint that we have prepared and move it to the next level." Exhibit "I" to Mosaic's Mot. to Dismiss. "We are prepared to file a complaint . . ." Exhibit "K" to Mosaic's Mot. to Dismiss. "[W]e need to go ahead and file our complaint." Exhibit "P" to Mosaic's Mot. to Dismiss.

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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